

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**August 1, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1226**

**Cir. Ct. No. 2012TP74**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO  
GREGORY R., A PERSON UNDER THE AGE OF 18:**

**DANE COUNTY DEPARTMENT OF HUMAN SERVICES,**

**PETITIONER-RESPONDENT,**

**v.**

**WESLEY J.,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Dane County:  
SHELLEY J. GAYLORD, Judge. *Affirmed.*

¶1 LUNDSTEN, J.<sup>1</sup> Wesley J. appeals an order of the circuit court terminating his parental rights to his child, Gregory R. Wesley argues that the circuit court erred when it granted summary judgment in favor of the Department of Human Services determining that Wesley was unfit. In particular, Wesley argues that summary judgment was inappropriate in this type of termination of parental rights case, that there were issues of material fact remaining such that summary judgment should not have been granted, and that the circuit court erred by accepting testimonial evidence at the summary judgment hearing. I reject Wesley’s arguments, and affirm.

### ***Background***

¶2 Wesley J. is the father of Gregory R. On August 10, 2012, the Dane County Department of Human Services (the “Department”) filed a petition seeking termination of Wesley’s parental rights to Gregory, alleging abandonment and failure to assume parental responsibility pursuant to WIS. STAT. § 48.415(1)(a)2. and 48.415(6).

¶3 Prior to trial, the Department filed a motion for summary judgment as to the grounds, or unfitness, phase of the termination of parental rights proceeding.<sup>2</sup> Along with the motion for summary judgment, the Department filed

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> Wisconsin has a two-part procedure for the termination of parental rights, a grounds phase and a dispositional phase. *Steven V. v. Kelley H.*, 2004 WI 47, ¶¶24, 26, 271 Wis. 2d 1, 678 N.W.2d 856. This appeal relates only to the first step of the procedure, the “grounds” or “unfitness” phase, during which the court or a jury determines whether one or more of the statutorily enumerated grounds for finding a parent unfit exists. *See id.*, ¶24. This appeal does not relate to the second step of the procedure, the “dispositional” phase, where the circuit court determines whether it is in the best interests of the child for his or her parent’s rights to be terminated. *See id.*, ¶¶26-27.

an affidavit from the social worker assigned to Gregory's case. This affidavit stated that Gregory has been placed continuously outside of a parental home by court order filed March 25, 2010, and that Wesley had no contact with Gregory from at least June 24, 2011, until October 31, 2012. Wesley did not file a response to the Department's motion for summary judgment.

¶4 At a pretrial hearing, after the summary judgment motion was filed, Wesley attempted to consent to a voluntary termination of his parental rights. During the plea colloquy, the circuit court became dissatisfied with Wesley's plea and rejected it.

¶5 After rejecting the voluntary termination, at the same pretrial hearing the circuit court heard the summary judgment motion. The court personally examined both Wesley and the social worker assigned to Gregory's case. The Department and Wesley each also had the opportunity to examine the social worker. During this hearing, the court granted the Department's motion for summary judgment on the grounds that Wesley had abandoned and failed to assume parental responsibility for Gregory, and was, therefore, unfit.

¶6 After a dispositional hearing, the circuit court terminated Wesley's parental rights. Wesley now appeals the court's decision granting summary judgment in favor of the Department.

### *Discussion*

¶7 Wesley argues that the circuit court improperly granted the Department's summary judgment motion for three reasons. First, Wesley argues that summary judgment cannot be granted in termination of parental rights cases that are based on abandonment or failure to assume parental responsibility.

Second, Wesley argues that, because the Department did not present summary judgment evidence that Wesley had no good cause for abandonment of Gregory, genuine issues of material fact exist and summary judgment was inappropriate. Finally, Wesley argues that the circuit court granted the motion for summary judgment based on improper summary judgment evidence, specifically, testimony heard at the summary judgment hearing.

¶8 We review a circuit court’s grant of summary judgment de novo, applying the same methodology as the circuit court. *Donaldson v. Town of Spring Valley*, 2008 WI App 61, ¶5, 311 Wis. 2d 223, 750 N.W.2d 506. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). The burden is on the party seeking summary judgment to demonstrate “the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim.” *Steven V. v. Kelley H.*, 2004 WI 47, ¶35, 271 Wis. 2d 1, 678 N.W.2d 856. The court reviews summary judgment materials in the light most favorable to the nonmoving party. *Thomas v. Mallett*, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523. Summary judgment materials are limited to the pleadings, depositions, answers to interrogatories, admissions, and affidavits. *See* § 802.08(2).

¶9 In a proceeding to terminate a parent’s rights based on grounds of abandonment under WIS. STAT. § 48.415(1)(a)2., the petitioner must prove that the child has been placed outside of the parent’s home by court order and that “the parent has failed to visit or communicate with the child for a period of 3 months or longer.” If the petitioner proves these elements, the parent may still defeat the

petition by proving by a preponderance of the evidence that he or she had good cause for failing to visit or communicate with the child. *See* § 48.415(1)(c).

¶10 In a proceeding to terminate based on the grounds of failure to assume parental responsibility under WIS. STAT. § 48.415(6), the petitioner must prove that the parent has not had a “substantial parental relationship with the child.” “Substantial parental relationship” means “the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child.” WIS. STAT. § 48.415(6)(b). In determining whether the parent had a substantial parental relationship with the child, the fact finder can consider, among other factors,

whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

*Id.*

¶11 The Department must prove grounds for termination by “clear and convincing evidence.” *See* WIS. STAT. § 48.31(1).

*1. Summary Judgment In A Termination of Parental Rights Case Due To Abandonment Or Failure to Assume Parental Responsibility*

¶12 Wesley first argues that summary judgment cannot be granted where parental rights are subject to termination due to abandonment or failure to assume parental responsibility. Wesley points to *Steven V.* to support the proposition that summary judgment is inappropriate where termination of a parent’s rights is based on these two grounds for unfitness. *Steven V.*, 271 Wis. 2d 1, ¶36.

¶13 In *Steven V.*, the court concluded that:

[P]artial summary judgment may be granted in the unfitness phase of a TPR case where the moving party establishes that there is no genuine issue as to any material fact regarding the asserted grounds for unfitness under Wis. Stat. § 48.415, and, taking into consideration the heightened burden of proof specified in Wis. Stat. § 48.31(1) and required by due process, the moving party is entitled to judgment as a matter of law.

*Id.*, ¶6. The ground for termination in *Steven V.* was the continuing court-ordered denial of periods of physical placement, which the court noted could be proven by documentary evidence of a court order. *Id.*, ¶¶2, 37. In contrast to grounds proven by documentary evidence, the court opined that summary judgment “will ordinarily be inappropriate in TPR cases premised on ... fact intensive grounds for parental unfitness,” including abandonment and failure to assume parental responsibility. *Id.*, ¶36. In these types of termination cases, “the determination of parental unfitness will require the resolution of factual disputes by a court or jury at the fact-finding hearing, because the alleged grounds for unfitness involve the adjudication of parental conduct vis-à-vis the child.” *Id.* Wesley argues that, because the grounds for his termination were abandonment and failure to assume parental responsibility, *Steven V.* prohibits the determination of fitness on a summary judgment motion.

¶14 I first observe that I need not discuss both abandonment and failure to assume parental responsibility. Either is a sufficient ground to support termination of Wesley’s parental rights. See WIS. STAT. § 48.415 (“Grounds for termination of parental rights shall be *one* of the following ....” (emphasis added)). Accordingly, I focus on abandonment.

¶15 I disagree with Wesley’s assertion that *Steven V.* prohibits summary judgment in a termination of parental rights case based on abandonment. Indeed, the *Steven V.* court itself made this clear. First, the observation quoted above includes the qualifier “ordinarily.” That is, the court is merely observing that there will ordinarily, but not always, be a factual dispute that prevents summary judgment when the issue is abandonment. Further, the *Steven V.* court noted that, by distinguishing between statutory grounds provable by documentary evidence and grounds provable by other types of evidence, like abandonment, the court did not “mean to imply that the general categorization of statutory grounds ... represent a definitive statement about the propriety of summary judgment in any particular case. The propriety of summary judgment is determined case-by-case.” *Steven V.*, 271 Wis. 2d 1, ¶37 n.4.

¶16 In sum, there is no general bar to applying summary judgment methodology when the issue to be resolved is abandonment.

## 2. *Genuine Issues Of Material Fact Remaining*

¶17 Wesley argues that, even if summary judgment is available in this case under *Steven V.*, it was still improperly applied because genuine issues of material fact remain as to the grounds of abandonment.<sup>3</sup> Wesley argues that genuine issues of material fact remain at issue because the Department did not produce evidence that Wesley lacked good cause for abandonment. That is, Wesley contends that, “[f]or summary judgment to be proper, the summary

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<sup>3</sup> Wesley also argues that genuine issues of material fact remain as to the grounds of failure to assume parental responsibility. As discussed above, because I affirm the circuit court’s grant of summary judgment and finding of unfitness as to abandonment, I need not determine whether genuine issues of material fact remain as to failure to assume parental responsibility.

judgment evidence would have to establish that there are no such fact issues pertaining to Wesley J.'s 'good cause' defenses."

¶18 Wesley fails to recognize that he has the burden of proof as to good cause for abandonment pursuant to WIS. STAT. § 48.415(1)(c). It is Wesley's burden to produce evidence showing that he had good cause, not the Department's burden to prove that he did not. Wesley failed to provide any summary judgment materials, in response to the Department's motion, showing that he had good cause.

### *3. Improper Summary Judgment Evidence*

¶19 Finally, Wesley argues that the circuit court granted the motion for summary judgment based on improper summary judgment evidence. Specifically, Wesley argues that the court erred in eliciting testimony from both the social worker and Wesley himself. Wesley is correct that, pursuant to WIS. STAT. § 802.08(2), summary judgment materials are limited to the pleadings, depositions, answers to interrogatories, admissions, and affidavits, and do not include testimony at the summary judgment hearing.

¶20 The fact that the circuit court accepted testimony at the summary judgment hearing does not require reversal. I need not weigh in on the propriety of such testimony for purposes of summary judgment because, apart from that testimony, there was sufficient and undisputed evidence presented in the affidavit of the social worker to support summary judgment. As discussed above, in a proceeding to terminate a parent's rights based on grounds of abandonment under WIS. STAT. § 48.415(1)(a)2., the petitioner must prove that the child has been placed outside of the parent's home by court order and that "the parent has failed to visit or communicate with the child for a period of 3 months or longer." The



social worker's affidavit stated that Gregory had been placed continuously outside of a parental home by court order since March 25, 2010, and that Wesley had no contact at all with Gregory from at least June 24, 2011, until October 31, 2012, well over three months. Wesley did not file a response to the Department's summary judgment motion showing that there were any facts in dispute, and he presented no evidence to support his current assertion that he had good cause for his failure to visit or communicate with Gregory. The Department was therefore entitled to judgment as a matter of law on the ground of abandonment.

### *Conclusion*

¶21 For the reasons above, I affirm the decision of the circuit court granting summary judgment in favor of the Department on the ground that Wesley had abandoned Gregory and was, therefore, unfit.

*By the Court.*—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

